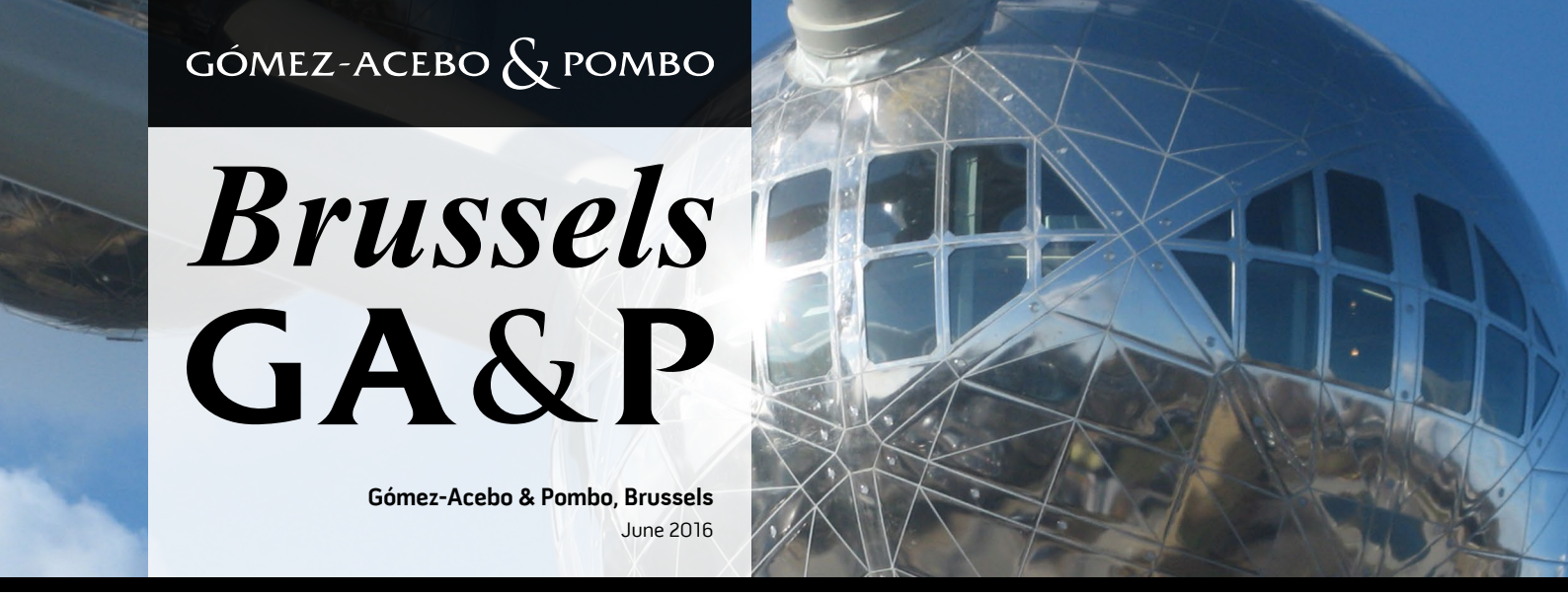

GÓMEZ-ACEBO & POMBO

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Content

News

Antitrust

Entry into force of new legislation to enhance card payment transparency

Last 9th June, the Regulation on Interchange Fees for Card-based Payment Transactions, adopted last year, entered into force; circumstance that has been welcomed by the Commission as it will increase clarity and efficiency for retailers and consumers regarding costs of payments with debit or credit cards.

When a transaction via debit/credit card takes place, the retailer's bank (or "acquiring bank") pays a fee to the bank that granted the card (or "issuing bank"). Then, an interchange fee is deducted from the final amount received by the retailer. Until now, banks usually charged a single blended fee for card transactions, although these charges could differ between brands. The new rules will provide greater transparency.

The first set of rules established by this new legal instrument started to be applicable last December and introduced caps on interchange fees for consumer debit and credit cards. The final set of rules (applicable since now) focuses on allowing a more efficiently card payment market by establishing the following principles:

(i) freedom to choose a preferred payment (for instance, the so-called "co-badging", such as a single card offering Bancontact and Maestro): retailers may now install a preferred brand in their payment terminals (before it was issuing banks who decided) and consumers may decide at the moment of the payment.

(ii) possibility for consumers to request to co-badge a single card (or in the years to come even their smart phones) with all card products (i.e. Visa, MasterCard, Maestro or American Express).

(iii) information to consumers: retailers shall now display the cards they accept in a clear and unequivocal manner at the shop or on their websites

Commission publishes annual Report on Competition Policy 2015

This report provides a detailed overview of policy and legislative initiatives together with decisions of the European Commission on EU Competition Law in 2015. The report is divided into two documents: (i) a Communication and (ii) a Commission Staff Working paper describing the developments in more detail (the latter being only available in English, French and German).

The report informs that the Commission in 2015 cleared 318 mergers (among which 20 with commitments), issued 7 antitrust/cartel decisions, and approved more than 200 State aid measures.

With regard to this report, Competition Commissioner Mrs. Vestager has highlighted the Commission's efforts to address harmful tax competition (i.e. decisions regarding the Belgian excess profit scheme, or the Luxemburgish and Dutch decisions related to Fiat and Starbucks respectively).

In addition, she has mentioned the Commission's commitment with the Digital Single Market initiative and the on-going e-commerce sector inquiry, which already has revealed some initial findings in March 2016. In this area, the Commission also sent a Statement of Objections to Google last April in relation to the Android operating system and applications.

The full text of this report is available at the following links:

http://ec.europa.eu/competition/publications/annual_report/2015/part1_en.pdf

http://ec.europa.eu/competition/publications/annual_report/2015/part2_en.pdf

The Spanish Competition authority publishes guidance on dawn raids

The *Comisión Nacional de los Mercados y la Competencia* (CNMC) has issued a note describing the procedure for competition inspections. This document explains the milestones of a dawn raid; from the legal authorisation and entry, to the powers of the investigators. It also describes the rights and obligations of the companies being investigated and the treatment given to information collected once the investigation is closed.

The note is aimed at improving the transparency and the knowledge on dawn raids so as to facilitate the

work of both the investigators and the companies been investigated.

Among the main issues addressed by the notice, it is to be highlighted: (i) the circumstances under which the authority may enter the premises of a company and the consequences of opposing to such entrance; or (ii) the powers of the investigators, who may not only access the headquarters but also transport means or domiciles; and verify any documentation; take copies or seal premises.

The note also describes the duty of cooperation of the companies; the criteria of selection of the collected information (what can and cannot be taken by the authority); the minutes of the inspection and the confidentiality of the information.

Case-Law & Analysis

The General Court confirms that the non-competition clause between Portugal Telecom and Telefónica in connection with the acquisition of the Brazilian mobile operator Vivo was illegal

In 2010, Telefónica acquired sole control of Vivo from PT (known as Portugal Telecom before). The agreement concluded between the parties included a non-competition clause for the Iberian market that was to apply between September 2010 and December 2011.

Following a communication from the Spanish competition authority, the Commission initiated a procedure against Telefónica and PT in January 2011, which led to the parties removing the controvert clause.

By a decision taken in 2013, the Commission established that the clause constituted an anti-competitive market-sharing agreement and fined Telefónica and PT 66 and 12 million euro respectively.

The companies challenged this decision before the General Court of the EU arguing, on the one hand, that the clause could not constitute a restriction by object; and, on the other hand, that the volume of sales achieved on the markets not subject to potential competition had to be excluded from the calculation of the fines.

The General Court has considered that PT did not prove that the restriction introduced by the clause was incidental to the acquisition and to the resignation of the members of the Management Board appointed by the Spanish company. In addition, it has considered that Telefónica did not sufficiently prove that the clause was imposed by the Portuguese authorities or that it was in any case essential to refrain from blocking the agreement. The General Court has also indicated that it has not been explained why a non-competition clause on the Iberian market could be objectively necessary for an acquisition of a Brazilian operator.

Finally, the General Court has held that the clause, bearing in mind its wide scope and the fact that it was part of a liberalised economic context, amounted to a restriction by object. Hence, the Commission, which was assisted by our GA&P Competition team in Lisbon (leaded by Mário Marques Mendes) in this case, was not obliged to proceed to a detailed analysis of the structure of the markets concerned and of potential competition.

In spite of the above, the General Court has considered that sales from activities that are not capable of competing with the other company during the period for which the clause was applicable shall be excluded in order to proceed with the calculations, and therefore has requested the Commission to recalculate the fines.

Currently at GA&P

Last April 28th, our Barcelona office held a conference on "Non-compete agreements — how to protect your clientele and know-how — a cross vision". The lecturers were Íñigo Igartua Arregui (Partner and Head of our Competition Law team), Daniel Marín Moreno (Partner within our Corporate Law department and Head of our Barcelona office) and Didac Ripollés (Counsel within our Labour Law department).